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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 435

JOHN D. SULLIVAN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 436

SHELDON R. TELLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1969. Petitions for rehearing were denied on July 7, 1969. The petitions for certiorari were filed on August 6, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the affidavits for search warrants were sufficient (raised in both petitions).

2. Whether cards on which were written the license numbers of vehicles assigned to narcotics agents, in plain view at the time of the search, were properly seized although not described in the search warrant (raised in No. 435).

3. Whether *Katz* v. *United States,* 389 U.S. 347, should apply retrospectively in this case (raised in No. 435).

4. Whether state law should determine the admissibility of evidence obtained by electronic overhearing of oral and telephone conversations with the consent of one of the participants (raised in No. 436).

5. Whether petitioner Sullivan was properly denied a severance (raised in No. 435).

RULE INVOLVED

Rule 8, F.R. Crim. P., provides as follows:

> (a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions con-

stituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

STATEMENT

After a trial by jury in the United States District Court for the Northern District of Illinois, petitioners were convicted (1) of selling heroin not in pursuance of a written order, in violation of 26 U.S.C. 4705(a), and (2) of receiving, concealing, etc., such heroin with knowledge of its unlawful importation, in violation of 21 U.S.C. 174. In addition, petitioner Teller was convicted of three narcotics offenses on which he alone was charged, violations of 21 U.S.C. 174 and 21 U.S.C. 176a. Teller was sentenced to concurrent terms of imprisonment for eighteen years and Sullivan to concurrent terms for nine years (T. App. 2–5, 10–12; S. App. 3–4)[1]. The court of appeals affirmed.

The relevant facts, which are not in dispute, are stated in the opinion of the court of appeals.[2] Petitioners were Chicago police officers. Their conversations with Washington, an informant, were overheard

[1] "T. App.", "T. Pet.", and "T. Pet. App." designate Teller's appendix in the court of appeals, his petition for certiorari, and the appendix to his petition. Similar abbreviations for Sullivan's documents are prefixed by "S.".

[2] The court's statement is adopted verbatim by Teller (T. Pet. 8–13). Sullivan does not question its accuracy, but gives more details, citing the trial transcript which has not been filed. We believe that the court's statement is adequate, here repeating its substance.

electronically by narcotics agents with Washington's consent. On July 14, 1966, Washington told Sullivan that he wanted to restock and gave Sullivan $1,500 in currency whose serial numbers had been pre-recorded. Sullivan said that he would have to see "Shelly" first. On July 21, Washington met both petitioners. He told Teller that he wanted one-fourth of a kilo of heroin and said that he had $3,000. Sullivan said that he could get it later. Washington said that he would await their call at his motel room. On the following day, Teller told Washington, by telephone, that he had failed to meet him because narcotics agents were in the vicinity. Washington agreed to meet petitioners behind his motel. Agent Jackson saw petitioners arrive at this spot in a police car. Teller got out and bent down near a pole. After they had driven away, Jackson went to the pole and found at its base a rolled black sock. Petitioners returned and Washington joined them in the police car.

Teller told Washington that his "stuff" was at the base of the pole and Teller needed his money to restock. Washington left the car, found the sock and delivered it to agent Jackson. The sock contained heroin. On the next day, July 23, the agents obtained federal arrest warrants for petitioners and search warrants for their residences. Search of the Teller residence revealed heroin, cocaine, marijuana, another rolled black sock containing narcotics, narcotics-making apparatus, and more than $45,000 in currency, including that previously recorded by the agents.[3] At

[3] The exact amount of pre-recorded currency was $2,700 (T. App. 87).

Sullivan's apartment were found cards on which appeared the license numbers of six automobiles assigned to narcotics agents (T. Pet. App. 2–4).[4]

The court of appeals at first held this case in abeyance because of the pendency before it of *United States* v. *White,* 405 F. 2d 838, certiorari granted, 394 U.S. 957. Since *Katz* v. *United States,* 389 U.S. 347, upon which the court of appeals' opinion in *White* was based, was later held not retroactive (*Desist* v. *United States,* 394 U.S. 244), and the trial here had taken place before the decision in *Katz,* the court subsequently concluded that this Court's ultimate determination in *White* could have no effect on the present case. Accordingly, it rendered its opinion, affirming petitioners' convictions on June 13, 1969 (T. Pet. App. 4–5).

ARGUMENT

1. The affidavits for search warrant adequately supported the commissioner's finding that there was probable cause to believe that a felony was being committed on the premises in question.[5]

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[4] The cards, which were not listed in the search warrant, were found on top of a dresser in the bedroom (T. App. 90).

[5] The affidavit of agent Hill, dated July 23, 1966, relating to the Teller premises, alleged as follows (T. Pet. App. 5–7, n. 6):

The undersigned being duly sworn deposes and says:

"That he has reason to believe that on the premises known as dwelling and garage at 9736 S. Longwood Dr. Beverly Hills, Chicago, Ill. in the No. District of Ill. there is now being concealed certain property, namely money which is the fruit of a crime to wit, a violation of Title 21. Sec. 174. U.S. Code.

[footnote continued]

The affidavit as to the Teller premises alleged that Teller was the occupant, that Washington had informed the affiant that he paid Teller $3,000 for narcotics on July 21, and that agent Jackson had observed the delivery of the narcotics. Although the affidavit thus failed to give all the details which could have been included, the allegation that agent Jackson had observed delivery of narcotics was alone sufficient to establish, for purposes of a search warrant, that a felony had been committed in his presence. Assuming that there remained any question of establishing the

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"And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

"Information from Samuel Washington, that he paid Sheldon R. Teller, occupant of said premises $3,000 for narcotic drugs July 21, 1966.

"Carl L. Jackson, a U.S. agt. informed complainant he saw the delivery of the narcotics.

"Complainant furnished Washington with the money. According to agts. Rendina and Hughes they observed said Teller in possession of narcotic paraphernalia on May 4, 1966."

Hill's affidavit as to the Sullivan premises was as follows (T. Pet. App. 7):

The undersigned being duly sworn deposes and says:

"That he has reason to believe that on the premises known as Apt. 409, Versailles Apartments, at 5234 So. Dorchester, Chicago, Ill. in the No. District of Ill. there is now being concealed certain property, namely money which is the fruit of a crime to-wit, a violation of Title 21, Sec. 174 U.S. Code.

"An (sic) that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

"Information from Samuel Washington, that he paid John Sullivan, occupant of said premises, $1,500, for narcotic drugs July 14, 1966 and that he Sullivan was present when $3000 was paid to Sheldon R. Teller by him on July 21, 1966. Carl L. Jackson, a nar. agt. informed complainant he saw the delivery of the narcotics on July 22, 1966."

reliability of an informant to whom the agents had entrusted $3,000,[6] confirmation of his information was abundantly supplied when the narcotics were in fact delivered. It is true that the funds might have been placed elsewhere, but it was reasonably probable that at least a portion of them, so soon after the transaction, would be found at the place most secure and most readily accessible to this petitioner. The question, of course, is one of probabilities, not of evidence sufficient to convict. *Brinegar* v. *United States,* 338 U.S. 160.

Furthermore, the affidavit alleged that named agents had observed this petitioner in possession of narcotics paraphernalia some two and a half months previously. Although this alone was not of compelling significance, it was a circumstance which could properly be considered by the commissioner. *Id.* at 171–174; *Jones* v. *United States,* 362 U.S. 257, 271; *Rugendorf* v. *United States,* 376 U.S. 528, 537. Allowance must be made for the fact that affidavits are normally drawn by non-lawyers. *United States* v. *Ventresca,* 380 U.S. 102, 108–109; *Jones* v. *United States, supra,* 362 U.S. at 270. The commissioner could rightfully find from the affidavit submitted that the charges against this petitioner were "not capricious" and that the probabilities were substantial that the advance funds paid for the narcotics, or a part thereof, were to be found on the premises Teller occupied. *Jaben* v. *United States,* 381 U.S. 214, 224–225.

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[6] This was the issue in *Spinelli* v. *United States,* 393 U.S. 410, up which petitioners apparently place principal reliance.

Similar observations are pertinent to the Sullivan search warrant. It was reasonable to believe that a portion of the money received for the joint enterprise would be found at this petitioner's residence. That money was not found does not impeach the legality of the search. *United States* v. *Di Re,* 332 U.S. 581, 595.

2. The cards on the top of Sullivan's dresser, bearing the license numbers of vehicles assigned to narcotics agents, were properly seized. Possessed of a valid warrant for search of the Sullivan premises, the officers were rightfully there. It has long been settled law, reiterated little more than a year ago, that objects falling in the plain view of an officer who has the right to be in a position to have that view are properly subject to seizure without a warrant. *Harris* v. *United States,* 390 U.S. 234, 236; *Ker* v. *California,* 374 U.S. 23, 42–43; *United States* v. *Lee,* 274 U.S. 559; *Hester* v. *United States,* 265 U.S. 57; *Gilbert* v. *United States,* 366 F. 2d 923, 932 (C.A. 9), certiorari denied, 388 U.S. 922; *United States* v. *Barone,* 330 F. 2d 543, 544–545 (C.A. 2), certiorari denied, 377 U.S. 1004. By definition, no search is involved in seeing an object plainly visible. It would be folly to require that, instead of taking it into custody, officers should ignore the existence of the object until a "search" warrant could be obtained, at which time the chances for its discovery would be slight.[7] Moreover, contrary to petitioner's

[7] This has not been changed, as urged in No. 435, by the decision in *Chimel* v. *California,* 395 U.S. 752, which limited the scope of a search without a warrant incident to a valid arrest.

contention (S. Pet. 31), the cards were instrumentalities of the crimes; their manifest purpose was to assist petitioner in concealing narcotics by evading the scrutiny of agents who might discover their traffic. Seized property need not be described in the warrant if the item in question is a means or instrumentality of the crime. See authorities collected in *United States* v. *Alloway*, 397 F. 2d 105, 110–111 (C.A. 6).

3. Sullivan also urges that the court of appeals should have applied retroactively its decision in *United States* v. *White*, 405 F. 2d 838, certiorari granted, 394 U.S. 957, No. 46, O.T., 1969. This petitioner, however, does not attempt to meet the reasoning of the court that, since its decision in *White* was based upon *Katz*, which has been held not to be retroactive, *White* could not be applicable to this case, which was tried before *Katz*. Since Washington testified for the government (S. Pet. App. 4), there is no issue in this case, as in *White*, of the unavailability of the person whose consent was obtained.

4. Teller asks that the Court grant review in connection with *White*, but on different grounds. His contention is that Illinois statute and case law should govern the admissibility of the evidence obtained by electronic means (T. Pet. 14–18). This same contention was raised in the brief in opposition to the petition for a writ of certiorari in *White*. But the court below was plainly correct in refusing to be governed by state law in this matter.[8] F. R. Crim. P. 26 pro-

[8] In any event, neither the action of the agents nor that of the informant was in violation of the Illinois eavesdropping statute (Article 14 of the Illinois Criminal Code of 1961),

vides that, except as otherwise provided by act of Congress or court rule, the admissibility of evidence shall be governed by the principles of the common law as interpreted by the courts of the United States in the light of reason and experience.

The codification of these rules has been the purpose of the Committee on Rules of Practice and Procedure of the Judicial Conference and its Advisory Committee on Rules of Evidence, which has produced a comprehensive draft of such proposed rules, submitted in March of this year. While not attempting to cover the subject of exclusionary rules, the draft is an expression of the purpose to make uniform throughout the federal courts the practice as to the admission and exclusion of evidence. The question whether to exclude evidence because illegally obtained is also "one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." *Elkins* v. *United States,* 364 U.S. 206, 224. And com-

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which proscribes the use of an eavesdropping device to hear a conversation "without the consent of any party thereto." In 1961, the Illinois Supreme Court held that an electronically-assisted overhearing does not violate this statute if consent is obtained from one of the parties to a conversation. *People* v. *Dixon,* 22 Ill. 2d 513, 177 N.E. 2d 224, certiorari denied, 368 U.S. 1003. While that court later overruled so much of the *Dixon* opinion that permitted the introduction into evidence of a monitored conversation against the party whose consent had not been obtained, *People* v. *Kurth,* 34 Ill. 2d 387, 216 N.E. 2d 154, its ruling did not make this evidence inadmissible in a federal proceeding, and expressly rejected an argument that monitoring with the consent of only one party violated Illinois law.

pare *Benanti* v. *United States,* 355 U.S. 96. The Seventh Circuit consistently has held that the Illinois statute cited by Teller does not create a special rule. *United States* v. *Martin,* 372 F. 2d 63, 66, certiorari denied, 387 U.S. 919, and *United States* v. *Krol,* 374 F. 2d 776, 778, certiorari denied, 389 U.S. 835. See also, as to a comparable Oklahoma statute, *Ferguson* v. *United States,* 307 F. 2d 787, 789–790 (C.A. 10), vacated on motion of the government to remand on other grounds, 375 U.S. 962; *Rogers* v. *United States* (same case), 369 F. 2d 944, 947 (C.A. 10), certiorari denied *sub nom. Ferguson* v. *United States,* 388 U.S. 922.

5. Sullivan was properly joined with Teller in the indictment and trial of this case. Rule 8(b), F.R. Crim. P., provides that two or more defendants alleged to have participated in the same transaction or series of transactions "may be charged in one or more counts together or separately and *all of the defendants need not be charged in each count*" (emphasis added). Such was this case, with both petitioners shown to have acted together in the dealings which led up to the transfer of a quarter kilo of heroin on July 22. Teller alone was charged in the last three counts, based on the narcotics found at his residence on July 22. The trial court could properly find that there was no prejudice to Sullivan from the discovery of narcotics on the Teller premises. As the court observed (S. App. 11), the failure to find narcotics at Sullivan's residence might well be regarded as exculpatory of Sullivan. It was the record of the dealings jointly participated in by both petitioners which established

the case against Sullivan. The case presents no problem of statements or confessions by one defendant incriminating the other, inconsistent defenses, or the like. Neither petitioner testified or presented a defense. The trial court did not abuse its discretion. *Opper* v. *United States,* 348 U.S. 84, 95.

6. Neither petitioner has raised the issues which are before the Court this Term in *Minor* v. *United States,* No. 189, and *Turner* v. *United States,* No. 190, *i.e.,* whether a prosecution under 26 U.S.C. 4705(a) is subject to the defense of the privilege against self-incrimination or whether the statutory presumption created by 21 U.S.C. 174 is valid. The Court may nonetheless wish to defer action on the petition until its decision in those cases.

In all other respects, for the reasons stated, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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